IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

KISHAN LAL @ KRISHN GOPAL V. THE STATE OF RAJASTHAN.

D. B. CRIMINAL APPEAL NO. 108/86

Under Section 374 (2), Cr.P.C.,against the Judgment dated 03.03.1986, passed by Shri M.P.Bohra, RHJS, Additional Sessions Judge, Barmer, in Criminal Original No.16/85.

DATE OF JUDGMENT :::: 04-10-2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI

Mr. Doongar Singh, for appellant.
Mr. J.P.S.Choudhary, P.P., for the State

BY THE COURT: (PER HON'BLE MR. BHANDARI, J.):-

Aggrieved by the judgment dated 3rd March, 1986, passed by the Additional District & Sessions Judge, Barmer, in Sessions Case No.16/85, the appellant has preferred this appeal.

The prosecution case was started with lodging of F.I.R. by Heer Singh s/o. Guman Singh on 02.08.1985 at about 1.45 a.m. with Police Station, Barmer. Heer Singh stated that he and Bhag Chand – a Clerk in Collectorate Office, are living together in Nehru Nagar. Opposite their residence, there exists house of Kishan Lal who is residing with his family. Kishan Lal was having enmity with Bhag Chand, because Bhag Chand raised objection regarding visit of unwarranted persons at the residence of Kishan Lal and taking liquor. Kishan Lal, his Mother Mst. Soni and brothers – Hanumana Ram and Jaiprakash used to threaten Bhag Chand. At about 12 – 1 in the night, he was about to sleep at his residence and, at that time, he heard louse noise of Kishan Lal, his mother Soni and Jaiprakash, abusing Bhag Chand while standing on the roof. At that time, he brought Bhag Chand to his residence, Kishan Lal and others did not stop abusing Bhag Chand. Bhag Chand, thereafter, proceeded to make a report of the incident to the Police. While Bhag Chand was about to proceed for Police Station, Kishan Lal and his family members kept on abusing Bhag Chand. Thus, he went to Bhag Chand to bring him back. However, Bhag Chand then went close to Kishan Lal's residence and stated that why they quarrel time and again, let the matter be settled. Thus, Bhag Chand stated Kishan Lal to come down. Bhag Chand, thereafter, sat on "Chabutari", in

front of Deshraj's house. Kishan Lal's mother Soni, thereafter, threw a water pot ("Matki") on Bhag Chand and, in that process, Karni Ram also came on the place of occurrence. Kishan Lal then stated that Bhag Chand should be killed today and thereupon, Jaiprakash threw one stone on Bhag Chand who then stood up. Thereafter, Kishan Lal had thrown a big stone on Bhag Chand, causing serious injuries. Thereafter, Kishan Lal threw yet another stone, causing injury on Bhag Chand's head. Bhag Chand lost his consciousness and fell down. Karni Ram ran away from the scene of the occurrence, seeing blood coming out from the injuries sustained by Bhag Chand and so far as the complainant is concerned, he immediately came to the Police Station to make a report.

The Police registered a case against four persons, namely, Kishan Lal, Jagidsh @ Jaiprakash, Mst. Soni and Hanunam Prasad under Section 307 of IPC, bearing FIR No.219/85. Since Bhag Chand died, thus case was converted under Section 302 of IPC. The Police conducted usual investigation and, thereafter, filed challan against all the four accused before the Chief Judicial Magistrate, Barmer. The case was, thereafter, committed to the trial Court. Thereafter, the trial Court framed charges against accused Hanuman Prasad under Sections 302 read with Section 109, 302/34, IPC and rest of three accused were charge-

sheeted under Section 302/34 of IPC. Accused denied charges and claimed trial. At the trial, twelve witnesses were produced and forty-five documents were exhibited by the prosecution, whereas no witness was produced by the defence, but exhibited three documents. The learned trial Court, thereafter, acquitted three accused, namely, Hanuman, Jaiprakash and Mst. Soni, but convicted Kishan Lal under Section 302 of IPC. The only accused was then sentenced to life imprisonment and imposed penalty of Rs.200/-.

Learned counsel for the appellant urged that the learned trial Court convicted Kishan Lal under Section 302, IPC, though no case was made out against him. It was submitted that the time of occurrence is around 12 – 1 in night, thus identification of the accused from a far distant place was not even possible, yet the testimony of one witness in regard to identification of accused was accepted by the trial Court, especially when it was not even possible to see as to out of many persons, said to be standing on the roof, who had thrown stone on the deceased and which stone hit which part of the body of the deceased. Yet, while acquitting three persons said to be involved in one and the same incident, Kishan Lal was convicted. The further case of the learned counsel for the appellant is that in the injury report, eight injuries have been shown, whereas as per the statements

of witnesses, only four injuries were caused by different persons, out of which allegations against accused was of causing only two injuries. Thus, how remaining injuries were sustained by the deceased remained unexplained. The two eye witnesses, produced by the prosecution, had not supported the prosecution case, namely, Mangilal (P.W.4) and Desh Raj (P.W.6) who where then declared hostile. Thus, two other eye witnesses were Heer Singh (P.W.1) and Karni Ram (P.W.7). However, statements of two eye witnesses were not corroborating prosecution story and were otherwise having contradictions to the statements made by them before the Police. In fact, both the eye witnesses were interested witnesses as eye witness Heer Singh admitted that he along with Karni Ram and deceased Bhag Chand used to drink together. Even on the day of the occurrence, Bhag Chand was found under the influence of liquor. However, ignoring all these aspects, while discharging three accused, appellant Kishan Lal was wrongly convicted and sentenced. It was lastly urged that it was not a case beyond Section 323 of IPC, if prosecution story is accepted to the extent of throwing stone, because it was not done with intention to kill a person. Thus, it was prayed that the judgment of the learned trial Court be set aside and the appellant be acquitted.

Per contra, learned Public Prosecutor supported the

judgment of the trial Court. It was urged that eye witness had categorically stated that Kishan Lal appellant has thrown stone on Bhag Chand and deceased Bhag Chand died out of those injuries, thus conviction of Kishan Lal under Section 302 of IPC, by the trial Court cannot be questioned on any ground raised by the learned counsel for the appellant. It was submitted that Bhag Chand and Kishan Lal were having old enmity. Thus, Kishan Lal caused injuries to Bhag Chand with a motive to kill him. Hence, according to the learned Public Prosecutor for the State, not only it is established that Kishan Lal caused serious injuries to Bhag Chand, but the same was with a motive to kill him, therefore, it was prayed that the judgment of the trial Court be maintained.

We have carefully considered the rival submissions of the learned counsel for the parties and gone through the record.

The prosecution case as set out in the First Information Report has already been narrated. Thus, with reference to the case set out in the FIR, it is required to be seen as to whether the incident narrated in the FIR has been proved by the prosecution or not. Since eye witnesses have been produced by the prosecution, thus first we will refer to the statements of those two eye witnesses to see as to what extent those

witnesses support prosecution story.

PW 1 Heer Singh stated that on 01.08.1985, he was at his residence along with Bhag Chand and Bhag Chand's friend Karni Ram. On that day, Hanuman Ram and Bhag Chand had some quarrel, because in the front room of Hanumanaram's residence, unwarranted persons used to make noise, after taking liquor. Thereafter, Hanumanaram's mother Soni, Kishan Lal and Jaiprakash started abusing Bhag Chand. However, in the meantime, they had taken their dinner and were about to sleep. When Hanumana Ram and others did not stop abusing, then Bhag Chand came out from his residence to make a report to the Police. However, initially Bhag Chand tried to settle the matter by calling Hanumana Ram and, in that process, he sat on "Chowki", in front of Deshran's house. He had seen Mst.Soni throwing a water pot on Bhag Chand and, thereafter, Kishan Lal threw a stone. When Bhag Chand got up from the place with the support of Karni Ram, then one stone hit Karni Ram's shoulder which was thrown by Hanumana Ram. Karni Ram fell down, but immediately ran away from the place and, thereafter, other stones were thrown by the accused. In the cross-examination, witness admitted that he and Karni Ram had taken dinner but Bhag Chand had not taken his dinner, contrary to his statement in examination-in-chief. The witness further admitted that he,

Bhag Chand and Karni Ram used to take liquor, but it was refused that they had taken liquor on the day of occurrence. The witness further admitted that he was residing at a substantial distance of accused's house as in between, there exists 3 to 4 houses. Therefore, nearly there exists 110 ft. distance between the two houses and width of road is taken, then distance becomes more than 150 ft. The witness further admitted that in his police statement, he has not stated that Bhag Chand and Hanuman fought earlier also and this was not even stated in the First Information Report. The witness further admitted that in his police statement as well as FIR, it was not stated that accused used to make noise after taking liquor with a further admission that his police statement in FIR does not contain fact of throwing stone on Karni Ram. Thus, lot of contradictions are found in the statement of this witness.

PW 7 Karni Ram is the other eye witness, who then stated that on 01.08.1985, Bhag Chand met him infront of MLA's house at around 8 P.M. The incident was quoted to be of 9.15 P.M. When Kishan Lal and Jaiprakash along with Soni were found abusing Bhag Chand and, at that time, Bhag Chand went out to stop all the three from abusing and settle the issue. At that time, PW 1 Heer Singh also followed Bhag Chand. Thereafter, all the three sat to take their dinner and after just starting dinner,

deceased Bhag Chand got up to visit police station to make a complaint against Kishan Lal and others. But, after coming out, Bhag Chand sat on “Chabutara”, in front of Deshraj's house. Then he and Heer Singh got up after taking their dinner, then heard noise of empty water pot being broken. Immediately he and Heer Singh came out and saw that Jaiprakash, Hanuman, Mst.Soni and Kishan Lal were throwing stones on Bhag Chand. Heer Singh thus stated that Karni Ram should go out and bring Bhag Chand. When he went near Bhag Chand to bring him, sustained a one throw of stone on his shoulder. However, till then, Bhag Chand sustained injuries on his head as well as on his face. In the cross-examination, witness had admitted that there exists 4 to 5 houses in the western side in between Heer Singh's house and the place of occurrence. The witness admitted that Bhag Chand met him at the Bus Stand, thus he changed his version as was stated in the examination-in-chief. Further, when witness was confronted with his police statement (Ex.D-2) to show that his police statement was different than the Court statement then witness stated that he had not stated that Bhag Chand and Heer Singh had taken dinner and the incident had taken place first time at 9 P.M., therefore, witness stated that he has not given out that incident took place at 12 in the night. It is otherwise stated that they heard noise of stone throwing while sitting in their place without showing as to how they were in a

position to see the incident at the distance of 150 ft. in the dark night. It was even admitted that the name of Hanuman was not shown in F.I.R. It was tried to explain that he forgot his name.

PW 4 Mangilal and PW 6 Deshraj Singh were produced as another eye witnesses, but both of them were declared hostile, therefore, prosecution case mainly rests on the statements of two eye witnesses, whose statements have been discussed. Now considering those statements, we have to find out as to whether they have correctly stated the facts without contradiction and further as to whether they corroborated prosecution story or not. We find that there exists contradiction in their statements, inasmuch as one witness stated that the incident took place after they had taken dinner, whereas other witness stated that incident took place, just after they started eating and, for that reason, deceased Bhag Chand could take his dinner. Though Heer Singh admitted that he along with Bhag Chand and Karni Ram used to take liquor together, but it was stated that on the day of occurrence, they had not taken liquor. Again, this statement has not been corroborated by medical evidence, where deceased was found to have taken liquor. Therefore, it comes out that even on the day of incident, if not all three then at least deceased Bhag Chand had taken liquor. Now, considering the occurrence of night, i.e., 12 – 1 a.m., if this part

of the story is taken as correct, then it was not possible for both eye witnesses to see the occurrence from a distance of more than 150 ft. in night and even to identify each accused by looking not only stone throwing, but to further identify as to which stone hit which part of the deceased's body. The witness had admitted that in between place of occurrence and their place, there exists 4 to 5 houses and considering this aspect, distance of 150 ft. was found by the trial Court. Therefore, the prosecution could not show as to how those two eye witnesses could identify accused, more so, when as per their statements, eye witnesses were not knowing the accused previously. It is further fact that two eye witnesses were interested witnesses, in view of the statement of Heer Singh, who had admitted that he along with Bhag Chand and Karni Ram used to drink liquor.

The learned trial Court found that the prosecution could not prove its case against Jaiprakash, Hanuman Ram and Mst. Soni, after considering the material available on record, but case against Kishan Lal was found to be proved beyond doubt and conviction of Kishan Lal is based on the same material which was otherwise discussed for the purpose of acquittal of other three accused against whom two eye witnesses have made same allegations as were existing against Kishan Lal. It seems that the trial Court has mainly relied statement of two eye

witnesses to the extent it was specifically indicated that Kishan Lal had thrown two stones on Bhag Chand. However, once the trial Court recorded its finding that looking to the distance and dark due to night, it was difficult to identify accused, more so, when both the two witnesses were not knowing the accused previously. Thus, with the same evidence, it cannot be specifically stated that the two stones thrown by Kishan Lal, necessarily hit on Bhag Chand's head, even if we believe contradictions in the statements and even the fact that the statement of one witness has not been corroborated by another. In fact, the prosecution, at the best, could prove that stones were thrown on Bhag Chand which caused certain injuries. Again, it has not been clarified as to how Bhag Chand sustained eight injuries, because Kishan Lal assigned two throws, Jaiprakash assigned one throw and one water pot has been assigned to Mst.Soni, more specifically water pot was hit on the head of Bhag Chand.

It cannot be ignored that even deceased Bhag Chand was found to have taken liquor, as the same has been certified in his post-mortem report. Therefore, story as being taken up by the prosecution that Bhag Chand and accused quarreled, for the reason that Bhag Chand was making allegations against Hanuman for making noise after taking liquor, becomes false,

rather it goes other way because it is Bhag Chand who was found to have taken liquor. Thus, in view of the facts mentioned above, we do not find that the prosecution could prove a case of murder against accused Kishan Lal beyond doubt, more so, when in common parlance, throwing of stone is not taken with the intention to kill a person and that too, when this case is reported to be a case of occurrence at 12 – 1 a.m. at the mid night, where one cannot throw stone with such accuracy that it may hit a person at the desired part of the body, more so, stone said to have been thrown from roof, while Bhag Chand was sitting on a "Chabutara". Even we have taken note of the fact that two eye witnesses are the interested witnesses and, their statements are having contradictions, rather they have made improvements in their statements while stating fact before the Court, than what was stated before the Police. Hence, looking to the discussions made above, we are not in agreement with the finding recorded by the trial Court to hold Kishan Lal guilty under the provisions of Section 302 of IPC. At the best, the prosecution could prove it to be a case falling under Section 325, IPC. Therefore, we set aside the conviction of Kishan Lal under Section 302, IPC and the appellant accused Kishan Lal is liable to be convicted and sentenced under Section 325, IPC.

Accordingly, the appellant is convicted under Section 325,

IPC, instead of Section 302 of IPC and is sentenced to the imprisonment already undergone by him. The accused is on bail, since for the last more than twenty years. Thus, he need not to surrender. His bail bonds are ordered to be discharged. The appeal is partly allowed. The judgment of the trial Court is modified to the extent indicated above.

(MUNISHWARNATH BHANDARI),J.(BHAGWATI PRASAD),J

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